

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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:
JUSTIN FESSLER, : Civil Action No.
:
Plaintiff : 1:18-CV-798
:
versus :
:
INTERNATIONAL BUSINESS :
MACHINES CORPORATION, :
:
Defendant. : August 31, 2018
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The above-entitled Motion hearing was continued
before the Honorable T.S. Ellis, III, United States District
Judge.

A P P E A R A N C E S

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Appearances continued:

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P R O C E E D I N G S

(Court proceedings commenced at 11:32 a.m.)

THE DEPUTY CLERK: Justin Fessler versus
International Business Machines Corporation. Civil Case No.
1:18-CV-798.

THE COURT: Who is here for the plaintiff?

MR. SIGMON: Good morning, Your Honor. Mark Sigmon
for the plaintiff along with Matt Lee and Tim Clinton.

THE COURT: All right. And for the defendant.

MR. BARNES: Justin Barnes on behalf of the
defendant along with co-counsel, Matt Nieman.

THE COURT: All right. The matter is before the
Court on a motion to dismiss. This is a dispute about
commissions due to a salesperson for IBM. I've read your
briefs. But let me hear first from the defendant.

Mr. Simon [sic], right?

MR. BARNES: Mr. Barnes.

THE COURT: Barnes, yes, I'm sorry, of course. Mr.
Simon [sic] is over here. Sigmon, I'm sorry.

All right. You may proceed.

MR. BARNES: Thank you, Your Honor. As Your Honor
knows, plaintiff has asserted a variety of claims in this case
related to allegedly unpaid commissions and IBM has moved to
dismiss all of plaintiff's claims based in large part on the
clear disclaimer set forth in the plaintiff's commission plan

1 and it's certainly IBM's contention that the Fourth Circuit
2 has already decided this issue in the *Jensen* case. In *Jensen*,
3 which was decided in 2006.

4 In *Jensen*, the plaintiff, like Mr. Fessler, was a
5 sales representative for IBM and sued IBM for allegedly unpaid
6 commissions because IBM had imposed a 200 percent rule,
7 whereby the plaintiff's commissions were reduced when he
8 exceeded two percent of his sales quota.

9 And the plaintiff sued IBM claiming that IBM should
10 not have done that. And importantly, one of the arguments
11 that the plaintiff in the *Jensen* case made was that he had
12 received a glossy brochure which contained language in it very
13 similar to the uncapped language that Mr. Fessler is relying
14 on in this case.

15 Specifically in the *Jensen* case this glossy brochure
16 said, "There are no caps to your earnings. The more you sell,
17 the more revenue and incremental profit for IBM and the more
18 earnings for you."

19 So there are no caps. The more you sell, the more
20 you earn.

21 The Fourth Circuit in affirming dismissal of the
22 plaintiff's claims, first noted that the disclaimers in Mr.
23 Jensen's sales plan precluded the creation of any agreement or
24 contract that would require IBM to pay additional commissions
25 to Mr. Jensen, but notably the Fourth Circuit went on to

1 address the plaintiff's argument about this uncaps language in
2 the glossy brochure. And let me just point out that the
3 plaintiff in *Jensen* his commission plan had a "Right to Modify
4 or Cancel" clause that had very similar language as the "Right
5 to Modify or Cancel" clause in Mr. Fessler's commission plan,
6 which basically said the plan doesn't constitute a promise by
7 IBM to pay any certain amount of commissions and that IBM
8 reserves the right to modify or cancel the plan.

9 The Fourth Circuit, after holding that that
10 disclaimer language precluded the formation of any agreement
11 that would require IBM to pay additional commissions, went on
12 to address this glossy brochure with the uncaps language, and
13 the Court noted that -- first disagreed with the plaintiff
14 that there was in fact a cap, but aside from that said, In any
15 event, even if this 200 percent rule could be construed as
16 imposing a cap, and even if that could be construed as being
17 inconsistent with this glossy brochure that says your
18 commissions would be uncapped, it didn't matter because the
19 disclaimer language in the plaintiff's commission plan gave
20 IBM the right to modify that commission plan.

21 The Fourth Circuit specifically said IBM would have
22 been within its rights under *Jensen's* purported contract to
23 introduce the 200 percent rule even after the deal closed,
24 based on the disclaimers contained in Mr. Jensen's commission
25 plan.

1 THE COURT: Well, as you know, the plaintiff says
2 his case is distinguishable from that because of the
3 PowerPoints. Right?

4 MR. BARNES: Respectfully, Your Honor, I don't
5 believe plaintiff even addressed the *Jensen* case or attempted
6 to distinguish it. But if he had, my response would be that
7 the PowerPoint in this case, which by the way there is not
8 even an affirmative allegation that Mr. Fessler ever even saw
9 it. But in any event, the PowerPoint that has the uncapped
10 language is just like the glossy brochure in *Jensen* that has
11 the uncapped language.

12 And I would point out that Mr. Fessler's commission
13 plan, the disclaimers in that plan apply not only to the IPL,
14 the incentive plan letter itself, but also apply to any of the
15 educational materials on IBM's website, including the very
16 PowerPoint that he's referring to now. Specifically, the
17 "Right to Modify or Cancel" section of Mr. Fessler's
18 commission plan says, "'The plan' does not constitute an
19 express or implied contract or promise by IBM to make any
20 distributions and that IBM reserves the right to adjust 'the
21 plan' terms." And then it goes on to define the plan as
22 including not just the incentive plan letter, but also all of
23 the materials located on IBM's incentives workplace website,
24 which is an internal Intranet where salespeople and managers
25 can gather certain educational materials about their incentive

1 plans, including the very PowerPoint that he's relying on now.

2 THE COURT: Does IBM contend that there's a written
3 contract concerning commissions between the plaintiff and IBM?

4 MR. BARNES: IBM contends that there is a written
5 document between the parties that spells out the party's
6 respective rights and responsibilities.

7 THE COURT: What is that?

8 MR. BARNES: That is the incentive plan letter that
9 was attached to IBM's motion to dismiss.

10 THE COURT: All right.

11 MR. BARNES: And that is -- that is a document that
12 spells out the party's respective rights and responsibilities,
13 but it does not impose any contractual obligation on IBM to
14 pay any additional commissions beyond what it in its sole
15 discretion determined to pay Mr. Fessler.

16 And I would note that the Fourth Circuit is not the
17 only Court to decide this issue. The Second Circuit, the
18 Tenth Circuit, the Eleventh Circuit and countless district
19 courts across the country have dismissed similar claims. And
20 admittedly, Your Honor, not all of those cases involved
21 allegations of uncapped language or allegations of fraud, but
22 I've already mentioned the *Jensen* case.

23 There's also another case where there was an
24 allegation of fraud and there was an allegation that the
25 plaintiff had been promised uncapped commissions and that was

1 the *Schwarzkopf v. IBM* case in the Northern District of
2 California. And in that case the plaintiff brought contract
3 claims, but also brought fraud and promissory estoppel claims.
4 And alleged in that case, I'm reading from the case,
5 *Schwarzkopf* points to numerous allegedly false representations
6 by his supervisors that he claims falsely represented that his
7 commission on the Cisco deal, the deal at issue in that case,
8 would not be capped.

9 The Court went on to say, "The clear disclaimers in
10 the IPL put him on notice that IBM had the right to adjust his
11 commissions." So even if these statements were made to him,
12 he cannot show as a matter of law any reasonable reliance on
13 those statements in light of the very clear disclaimer in his
14 incentive plan.

15 So it's IBM's position that IBM is up-front with
16 sales representatives about the policies applicable to their
17 commission plans. These commission plans come out every six
18 months and every single one contains the same disclaimer
19 language in it. And if Mr. Fessler were to claim that he
20 never read that, as Your Honor knows, he is imputed with that
21 knowledge. He cannot simply claim that I never read it and it
22 not be subject to those terms as the Fourth Circuit noted in
23 the *Jensen* case.

24 THE COURT: Well, I take it since you contend there
25 is a written agreement between the parties that quantum meruit

1 would not apply. Is that your view?

2 MR. BARNES: That's correct, Your Honor. One of the
3 arguments we made on quantum meruit was certainly that there
4 is a document between the party that spells out parties'
5 respective rights and responsibilities and therefore he cannot
6 bring a quantum meruit claim to recover something that he is
7 not entitled to recover under the clear terms of the
8 commission plan.

9 THE COURT: All right. Thank you. Let me hear from
10 the plaintiff.

11 MR. SIGMON: Thank you, Your Honor. Mark Sigmon on
12 behalf of the plaintiff. And I wanted to introduce quickly
13 Mr. Fessler, who is here today.

14 Your Honor, I think the most important facts in this
15 case are that IBM has admitted under oath that the statement
16 in the PowerPoint, the exact statement and the exact power
17 point that Mr. Fessler received, created an obligation not to
18 cap them. That's the exact words. They had an obligation.
19 They admitted that that statement was reasonable for sales
20 people, just like Mr. Fessler, to rely on to believe as true.
21 So the only --

22 THE COURT: The statement was that they were
23 uncapped.

24 MR. SIGMON: Uncapped.

25 THE COURT: So they can be infinite?

1 MR. SIGMON: Well, it will be controlled by the
2 percentage of the percentage commission you got. So if you
3 sold an infinite number of goods, I suppose five percent of
4 infinity would be infinity. But the point is it's not -- it's
5 not capped.

6 And so the only issue then is what is happening and
7 they've already admitted what that is too. Two of their
8 witnesses in a previous case that we've referenced both
9 testified that what happened -- essentially what happened to
10 Mr. Fessler here is capping. In the earlier case, there was
11 e-mails where internal IBM e-mails at the time before
12 litigation where IBM said discussed what they were doing to
13 the earlier plaintiff and said they're capping him.

14 And we've alleged quite reasonably that there will
15 be similar e-mails in this case. And so if IBM has admitted
16 an obligation not to cap, and the only issue is did they cap,
17 and the evidence, I think, is clearly at a 12(b)(6) stage,
18 certainly now, but I think the evidence will show that they
19 did cap. And therefore, I'm not sure what's left. That to me
20 is a contract claim.

21 Let me address *Jensen* very quickly because IBM
22 relies a lot on that. First of all, that case only involved a
23 breach of the IPL. There's no mention of fraud, no mention of
24 constructive fraud, no mention of anything else. So *Jensen* is
25 only about that. And there's no mention of a PowerPoint in

1 there too.

2 Number two, of course *Jensen* doesn't have any of the
3 allegations that we have that I just mentioned about the
4 obligation that they've admitted; their reliance that's
5 reasonable, that they've admitted; and the fact that there was
6 a cap.

7 There's another way that *Jensen* is further
8 distinguishable, Your Honor, which is that in *Jensen* there was
9 this 200 percent rule. Where essentially it said that once
10 you've reached 200 percent of your quota, your quota
11 percentage is kicked down to 1 percent. We don't have that
12 here. There is no 200 percent rule in this case.

13 We do have something else called the "significant
14 transaction exception." And that's the thing they tried to
15 work on in *Choplin*. The significant transaction exception
16 here has two prongs. The first says if we get your quota
17 wrong or your territory wrong, we can fix it. There's no --
18 we've alleged that doesn't apply here. I don't think it does.

19 The second prong is called a "relative
20 contribution." And it says that if your contribution to a
21 sale is not proportional to somebody else's, we can adjust
22 your commission. They tried to claim that in the earlier
23 case. The problem is that there was zero evidence that they
24 did any analysis of relative contribution between salespeople.
25 What they did was create a 10 percent cap on everybody and

1 they never -- it's not like they allocated the money, it's not
2 like they said we want to save money from this person and
3 we'll give it to this person. That's not what they did. They
4 just cut everyone to save money to a secret internal 10
5 percent budget.

6 And so this 200 percent rule in *Jensen* doesn't apply
7 here. We have this other thing that we've alleged doesn't
8 apply and we think there's plenty of evidence on that.

9 So again, there is no fraud or constructive fraud
10 based in *Jensen*. And of all the cases that IBM cited, in all
11 the cases, there's only two that ever mentioned they have a
12 fraud claim.

13 And just to mention one of them, the *Schwarzkopf*
14 case. In the *Schwarzkopf* case, Your Honor, the Court actually
15 concluded, and this is near the end, and arguing against IBM's
16 -- and concluding that IBM was correct said, "First, no one
17 affirmatively told *Schwarzkopf* that he would receive a full
18 commission." There was no representation in that case that he
19 would receive a full commission. There was no PowerPoint in
20 that case. We have this PowerPoint that says, "you shall not
21 be capped" that they've already admitted under oath, you know,
22 that -- that admitted under oath creates that obligation. I
23 think *Schwarzkopf* probably got it right about fraud. There
24 was just no statement there that was fraudulent. We've
25 alleged that.

1 The only other case of all the ones they've
2 mentioned is the *Pero* case. The *Pero* case same thing, no
3 mention of the PowerPoint, no mention of any specific
4 fraudulent representation at all.

5 And so I don't think that *Jensen* controls even the
6 contract claim here, but if it does control that, that's all
7 it controls and it doesn't control the fraud or the
8 constructive fraud, which frankly, to some degree are the
9 center of the plaintiff's case.

10 And finally, Your Honor, opposing counsel mentioned
11 that we did not allege that Mr. Fessler actually saw the
12 PowerPoint. I think that's just false on its face. If you
13 look at paragraphs 12, 13, and 14, we said the Mr. Fessler was
14 presented with the PowerPoint. We then said that he relied on
15 the PowerPoint. I suppose we did not use the words "he saw
16 the PowerPoint." He -- that was obviously under 12(b)(6) and
17 under *Twombly* I think that's sufficient. He did, in fact, see
18 the PowerPoint. I know we're in a 12(b)(6) stage, but if I
19 can put him on the stand right now and say that he saw the
20 PowerPoint, I would. So I think that we clearly allege that.

21 You know, Your Honor, frankly, in sum of all of
22 this, I think that if this was a very first case against IBM
23 in this regard, it seemed to me like it would be the easiest
24 case ever on a 12(b)(6), especially when someone has alleged
25 an obligation not to cap. The only reason, I think, that IBM

1 -- their argument has any sway at all is because there's other
2 cases where they've won. And I get that. I get that. Which
3 is why we never alleged a breach of the IPL. We acknowledge
4 that the IPL is not a contract. We've agreed with that. If
5 you look at our complaint, we never say you've breached the
6 IPL.

7 That's why we said the IPL is not a contract, fine.
8 Then what we have is either an oral or an implied contract or
9 unjust enrichment or quantum meruit, which are all
10 contract-based things. And even if all of those fail because
11 of the IPL, if even those fail, we have fraud and constructive
12 fraud which in Virginia, as Your Honor well knows,
13 constructive fraud is a negligent representation. At the very
14 minimum, IBM negligently represented here that its policy and
15 practice was not to cap on anew. It's always been the cap.
16 They just don't tell people that.

17 So, Your Honor, I respectfully submit that all of
18 those other cases do not control. This is -- this is a
19 different animal and --

20 THE COURT: All right. Thank you. Mr. Barnes.

21 MR. BARNES: Thank you, Your Honor. I just want to
22 respond to a couple of things. And I'll try to avoid
23 rehashing what we've already discussed.

24 First, well, *Jensen* didn't involve a PowerPoint,
25 maybe back in the early 2000s IBM wasn't using PowerPoints for

1 these things, *Jensen* very clearly did involve a glossy
2 brochure that was handed out to sales representatives that
3 said there are no caps.

4 I cannot think of a case that is more on point than
5 what we're addressing here.

6 THE COURT: You say that's the same as a PowerPoint?

7 MR. BARNES: Yes, Your Honor, it is.

8 THE COURT: Go on.

9 MR. BARNES: And in that case the plaintiff had seen
10 it, affirmatively alleged that he had seen it.

11 In the *Schwarzkopf* case there were allegations in
12 that case that managers told Mr. *Schwarzkopf* that he should be
13 paid in full. And Mr. *Schwarzkopf* then -- and encouraged him
14 to maximize his earnings by going out and selling as much as
15 he could on the deal at issue in that case. So the
16 allegations in *Schwarzkopf*, which led to the dismissal of the
17 plaintiff's fraud claim were very, very similar to those at
18 issue in this case.

19 And this simply is not the first case. If this were
20 the first case, then I certainly would still believe that it
21 should be dismissed, but it's not. We've got countless other
22 courts all over the country dismissing similar claims and
23 certainly believe the Court should do the same here. And I
24 would -- it sounds to me like there's not much of a dispute
25 that the contract in quasi contractual claims should be

1 dismissed, but certainly the fraud and constructive fraud and
2 other claims should also be dismissed as well. I would note
3 that on the fraud versus constructive fraud, we briefed this
4 in our brief so I don't want to rehash it here, but I think
5 based on the allegations that Mr. Fessler has raised, he can
6 only pursue fraud, not constructive fraud since it's based on
7 we'll pay you commissions in the future. That cannot form the
8 basis for a constructive fraud claim. He has to be held to
9 the higher burden of actual fraud.

10 THE COURT: All right. Thank you.

11 MR. BARNES: Thank you, Your Honor.

12 THE COURT: I will take the matter under advisement.
13 You'll hear from me in the near future. Thank you.

14 MR. BARNES: Thank you, Your Honor.

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16 **(Proceedings adjourned at 11:51 a.m.)**
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CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Motion hearing in the case of the **JUSTIN FESSLER, versus INTERNATIONAL BUSINESS**, Civil Action No. 1:18-CV-798, in said court on the 31st day of August, 2018.

I further certify that the foregoing 17 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this February 8, 2019.



Tonia M. Harris, RPR
Official Court Reporter